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93-119

NO. _____

Supreme Court, U.S.
FILED
JUL 16 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE CADLE II COMPANY, INC., Petitioner,

v.

CHARLES R. CHASTEEN,
BILL M. CARTER,
JIMMY J. HOLMES,
AND LINDELL D. ROBERTS, Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the United States Magistrate and the United States Court of Appeals for the Tenth Circuit erred by finding that an award of attorney's fees for Respondents' counsel of $62.50 per hour was unreasonable when Respondents' counsel agreed to accept the sum of $62.50 per hour as compensation during the pending litigation?

B. Whether 12 O.S. § 936 which provides that the "prevailing party" shall be allowed a reasonable attorney's fee to be set by the court and to be taxed and collected as costs in any civil action to recover on a Note requires an imposition of an award of attorney's fees to the prevailing party to reimburse the prevailing party for only the amount of

attorney's fees the prevailing party has incurred?

C. If the Court does award $125.00 as the only reasonable attorney fee, do the Respondents get to keep the extra $62.50 and only pay $62.50 to the attorney or does the attorney get twice his fee?

LISTED PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all of the parties to the proceeding in the United States Court of Appeals for the Tenth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATE

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THE CADLE II COMPANY, INC., Petitioner,

v.

CHARLES R. CHASTEEN,
BILL M. CARTER,
JIMMY J. HOLMES,
AND LINDELL D. ROBERTS, Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE TENTH CIRCUIT

The Cadle Company II, Inc., the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on March 29, 1993.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, whose Judgment is herein sought to be reviewed, was rendered on March 29, 1993, and entered on March 29, 1993, in Case Number 92-6318, is unreported and is reprinted in the Appendix hereto, infra, pages 1-10. The prior Order of the United States Magistrate Judge of the United States District Court for the Western District of Oklahoma, in Case Number CIV-90-1270-R, entered on August 26, 1993, is unreported and is reprinted in the Appendix hereto, infra, pages 1-16.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on March 29, 1993. The Petitioner, The Cadle Company II, Inc., timely filed its Petition For Rehearing on April 12, 1993. The United States

Court of Appeals denied the Petitioner's Petition For Rehearing on April 19, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

12 O.S. § 936

ATTORNEY'S FEES TAXED AS COSTS IN ACTION ON CERTAIN ACCOUNTS, BILLS AND CONTRACTS.

In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to[1] the action, the prevailing party shall be

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[1]"to" should be "of".

allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

STATEMENT OF THE CASE

The Petitioner, The Cadle Company, II, Inc. ("Petitioner") brought this action in the United States District Court for the Western District of Oklahoma on August 7, 1990, invoking the jurisdiction of the District Court pursuant to 28 U.S.C. § 1332(a)(1), as the amount in controversy exceeded $50,000.00 and there was diversity of citizenship between the Petitioner and Respondents.

The Petitioner sought to enforce payment of the balance of a promissory note executed and delivered by a corporate debtor, Dayspring Church, Inc., to the Oklahoma National Bank & Trust Company from the four Respondents. (The

corporate debtor, Dayspring Church is not a party to the litigation.) A jury trial was held in the above-styled matter beginning March 18, 1991, continuing on March 21, 1991, and concluding on March 22, 1991. The jury returned a verdict for the Respondents, and awarded the Petitioner nothing on its Complaint. (The Petitioner timely appealed the jury verdict. The Court of Appeals affirmed the jury's verdict on January 23, 1992.)

Sometime during the pendency of the District Court proceedings, Respondents and their attorney agreed to a reduction in the hourly rate charged. The agreement for a reduction to $62.50 per hour was retroactive to the beginning of the case. After Respondents were successful at trial, Respondents' attorney requested attorney's fees at the rate of $125.00 per hour.

On April 8, 1991, the Respondents filed their Application To Tax Attorney's Fees Against The Plaintiff. The Petitioner filed its Objection To The Defendants' Application To Tax Attorney's Fees Against Plaintiff on April 23, 1991. Petitioner argued that Defendants were not entitled to attorney's fees because guaranty agreements were not within the class of contracts that 12 O.S. § 936 authorized an award of attorney's fees to the prevailing party. Petitioner further argued that the Court should be limited to the rate of $62.50 per hour in computing a reasonable attorney's fee because that was the hourly rate charged by Respondents' counsel pursuant to an agreement reached between Respondents and their attorney.

On May 17, 1991, the Honorable Judge David L. Russell issued an order

determining that the Respondents were entitled to attorney fees pursuant to 12 O.S. § 936. Appellant appealed the Order of May 17, 1991, by Notice of Appeal filed on June 17, 1991. It was later determined that the Notice of Appeal filed on June 17, 1991, was premature and Petitioner filed a Motion To Dismiss for lack of appellate jurisdiction.

On January 23, 1992, counsel were advised that the Judgment in favor of the Respondents was affirmed by the Court of Appeals. On February 5, 1992, the Respondents filed their Motion To Tax Attorney's Fees And Costs combined with their Motion To Refer Attorney's Fee Requested To The District Court and Brief In Support in the United States Court of Appeals for the Tenth Circuit. The Court of Appeals for the Tenth Circuit by Order

filed on February 27, 1992, granted the Respondents' Motion For Attorney's Fees on appeal and remanded the matter to the District Court for a determination of reasonable attorney's fees.

On March 19, 1992, the Respondents submitted their Renewed And Supplemented Application To Tax Attorney's Fees Against The Plaintiff. Petitioner filed its Objection To Respondents' Renewed And Supplemented Application To Tax Attorney's Fees Against The Plaintiff on April 7, 1992. Respondents filed an Addendum to their Renewed And Supplemented Application To Tax Attorney's Fees Against The Plaintiff on June 18, 1992.

On July 17, 1992, the attorneys for the parties executed a consent to proceed before the United States Magistrate respecting the Defendants' Renewed And

Supplemented Application To Tax Attorney's Fees Against The Plaintiff filed March 19, 1992. A hearing was held on August 18, 1992, before Magistrate Doyle W. Argo. The issue before the Court was the reasonable hourly rate for Respondents' attorney. By order of August 26, 1992, Magistrate Doyle W. Argo found the Respondents were entitled to attorney's fees in the sum of $19,425.00. The Magistrate Judge determined that a "reasonable hourly rate" for Respondents' attorney is $125.00 per hour. On September 18, 1992, the Petitioner timely filed its Notice of Appeal. On March 29, 1993, the Court of Appeals affirmed the Magistrate Judge's decision determining that a reasonable hourly rate for Respondents' counsel was $125.00 per hour. The Petitioner timely filed its Petition For Rehearing, and by Order

entered on April 19, 1993, the Court of Appeals denied Petitioner's Petition For Rehearing. The Petitioner timely files its Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the District Court and the Court of Appeals have departed far from the accepted and usual course of judicial proceedings in determining that Respondents' should be awarded attorney's fees at the rate of $125.00 per hour.

The issue in this case is whether an attorney who agreed to reduce his attorney's fee during the pendency of an action may, after prevailing at trial, seek to obtain an award of attorney's fee based upon an hourly rate twice what he charged his clients.

The Oklahoma Statute which provides the basis for an entry of award of attorney's fees both in Federal Court and State Court provides that "the prevailing party is entitled to reasonable attorney's fees...." The attorney's fees paid by the Respondents to their counsel were based upon an agreed hourly rate of $62.50 per hour. The Respondents' counsel indicates that this is "a hardship reduction." This reduction to $62.50 per hour by Respondents' counsel continued through the trial of this matter. After the jury returned with a verdict in favor of the Respondents, a Motion For Attorney's Fees was filed by Respondents' counsel requesting attorney's fees in the amount of $125.00 per hour. The District Court relied on Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988).

In distinguishing Florida Rock Industries, Inc. v. United States, 9 Cl. Ct. 285 (1985), the Court stated, "(h)ere Plaintiff cannot seriously argue that the prevailing rate of an attorney of Mr. Tobin's experience and qualifications is $62.50 per hour." While the Petitioner does not dispute a reasonable hourly rate for Respondents' counsel under most circumstances would be $125.00 per hour, Petitioner submits that the District Court should have relied on Florida Rock. Florida Rock determined that a "market rate" for attorney's services was the primary standard in determining a reasonable hourly rate. The Florida Rock Court found that since the attorney and his client had agreed to a particular hourly rate, the market had spoken. Florida Rock, 9 Cl. Ct. 288, 290.

The Court of Appeals consistent with the lower court, found the case of Save Our Cumberland Mountains, Inc. v. Hodel to be more persuasive then Florida Rock. The Court of Appeals determined that there was no Oklahoma law which addressed the issue of whether a court should enforce an agreement between an attorney and his client for a reduced hourly rate against a non-prevailing party. The Court of Appeals then determined that it would have to "predict" how the Oklahoma courts would rule on the issue. The Court of Appeals incorrectly determined that the reasonable hourly rate should be based upon Respondents' counsel's normal hourly rate of $125.00 per hour.

The Court of Appeals and the lower court have failed to consider the express statutory language 12 O.S. § 936 which provides that "the prevailing party" is

entitled to an award of reasonable attorney's fees. The Statute does not refer to the prevailing party's attorney, but refers specifically to the prevailing party. The Oklahoma Statute is similar to the Congressional Mandate for Attorney's Fees in the Relocation Act which is the subject of the Florida Rock case. The language of the Relocation Act provides that a successful plaintiff shall be "reimbursed" for attorney's fees and other expenses. Such is the philosophy behind an award of attorney's fees to the prevailing party. An award of attorney's fees enables a successful party to be reimbursed for his "out-of-pocket" attorney's fees while allowing a private party to obtain legal representation for the prosecution or defense of lawsuits. See Pennsylvania v. Delaware Valley Citizens' Counsel For

Clean Air, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed. 2d 439 (1986)(Delaware Valley I); Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516, 1528 (D.C. Cir. 1988) (Justice Starr, dissenting).

The attorney's fees awarded in cases should be adequate to attract competent counsel, but should be reflective of an amount which does not produce windfalls to attorneys. Blum v. Stenson, 465 U.S. 886, 893-94, 104 S.Ct. 1541, 1546, 79 L.Ed. 2d 891, 895 (1984). As the court in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) noted "[i] in no event, ...should the litigant be awarded a fee greater than he is contractually bound to take, if indeed, the attorneys have contracted to an amount." Johnson v. Georgia Highway Express, 488 F.2d 714, 718 (5th Cir. 1974). The existence of a market

arrangement, whereby an attorney agrees to perform certain work and the client agrees to make certain payments, would seem to establish with a fair degree of accuracy the reasonable attorney's fees and expenses incurred by plaintiff in this litigation. Florida Rock, 9 Cl.Ct. at 288. The reason for an award of attorney's fees is to enable a prevailing party to be made whole for the expenses incurred in achieving victory. An attorney should not be awarded a windfall on the basis of the result achieved, litigation risk or other consideration. Florida Rock, 9 Cl.Ct. at 290.

Justice Starr, in his dissenting opinion in Hodel succinctly summed up the reasons why an award of attorney's fees should be based upon the hourly rate as agreed between attorney and client:

"The same theme was evident in *Delaware Valley II*. There, again speaking through Justice White, a plurality of the Court articulated the enablement goal in rejecting 'enhancement for risk of loss' for successful plaintiffs. "[A] Fundamental aim of [fee-shifting] statutes is to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel, this by providing lawyers with reasonable fees to be paid by the losing defendants." The Court has re-articulated the enablement theme time and again, and enablement, as the Supreme Court has described it, is a minimalist test. It does

not mean access to F. Lee Bailey, Gerry Spence, "Racehorse" Haynes or the leading trial lawyer in a particular locale. It means as the Court put it in Hensley v. Eckerhart, 'Effective access to the judicial process.' The idea is to permit plaintiffs to secure the services of a competent lawyer. Indeed, that is the very language used in the legislative history to describe the three cases. 'These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.' 'Adequacy' and 'competency' are the key words that give life to the

'enablements' theory. Laffey itself captured the enablement goal in the following passage:

> The 'windfall' Congress sought to avoid is the awarding of fees in excess of the rate at which qualified counsel would be willing to represent civil rights claimants who have legitimate grievances. The congressionally-mandated inquiry is thus not into the 'true value' or worth of an attorney's services. Instead, the trial court must

> ascertain the fee at which competent counsel would be willing to accept meritorious civil rights cases. As this Court recently stated in Murray v. Weinberger, 'the purpose of the statute ... is to benefit meritorious claimants - not to subsidize the legal profession.'

But, be that as it may, enablement 'should be tested systematically, not on whether a particular attorney, no matter how able and distinguished, will see fit to

> take on a particular representation. As the Delaware I Court put it so succinctly: "[I]f plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on a statutory assurance that he will be paid a 'reasonable fee', the purpose behind the fee-shifting statute has been satisfied." It is 'a lawyer', not the lawyer of choice, that the statute seeks to provide." [Citations omitted.]

Hodel, 857 F.2d at 1528-30 (Justice Starr, dissenting).

It is also important to afford the Respondents' counsel the benefit of his bargain. In reaching the agreement, the attorney and the clients have already

considered and weighed all of the relevant factors. Florida Rock, 9 Cl.Ct. at 290. Certainly, the fact that Respondents' counsel reduced his fee is evident of the "enablement theme" which requires access not to the greatest trial lawyers in the United States, but effective access to the judicial process. The Respondents, by having their day in court, had the effective access to the judicial process that is consistent throughout the opinions of this Court.

This Court, in Vanegas v. Mitchell, 110 S. Ct. 1679 (1990), noted that "it is the party who is...eligible for an award of attorney's fees." Statutory awards of attorney's fees may also co-exist with private fee arrangements. Just as a party is entitled to receive the fees in an appropriate case, this Court has recognized that it is a party's right to

waive, settle or negotiate the eligibility for fees. Vanegas, 110 S. Ct. at 1683. This Court, in Vanegas, distinguished Blanchard v. Bergeron by noting "Blanchard did not address contractual obligations of plaintiffs to their attorneys;...." This Court paid deference to the contract between attorney and client and held the agreement to be valid. Vanegas, 110 S. Ct. at 1684.

In Blum, this Court rejected a 50% "enhancement bonus" requested by the attorneys for the prevailing party. The Court determined that a 50% enhancement was unnecessary and that the fee or hourly rate charged by each attorney multiplied by the number of hours for each attorney fully compensated the attorneys. Blum is similar to the instant case in that the Respondents'

counsel is seeking a 50% "enhancement bonus" from the amount he charged his client. He seeks this "bonus" only because his clients prevailed at trial. The $62.50 hourly rate charged by Respondents' counsel fully compensates Respondents' counsel. This is the hourly rate that he agreed to accept from the Respondents and such a rate would have been fully compensatory in the event that the Respondents did not prevail. If there is to be one fee paid by Respondents to their attorney if they lose and another fee to be paid by Petitioner to Respondents' Attorney if Respondents prevail, the additional fee is in the form of an "enhancement bonus" from the amount Respondents' counsel charged his clients. To provide Respondents' counsel with an increased hourly rate would provide the windfall

sought to be avoided when awarding attorney's fees in excess of the rate at which qualified counsel would be willing to represent parties with legitimate grievances. Hodel, 857 F.2d at 528-30 (Justice Starr dissenting).

The underlying action was an action by the successor in interest to the Federal Deposit Insurance Corporation (hereinafter referred to as "FDIC") against four guarantors, seeking payment of the balance due of a note executed by a corporate debtor. While the amount sought by Petitioner at trial was nearly $400,000.00, it is doubtful that the Respondents could satisfy a judgment if one had been entered. Typically, in a case such as this, the debtor is unable to pay the judgment, much less pay attorney's fees to the plaintiff's counsel. In that instance, the fees

would remain unpaid, or might even be discharged in bankruptcy.

However, if a solvent creditor actively pursues a judgment against debtors and is the non-prevailing party, the creditor, at least in Oklahoma, will likely be required to pay debtor's attorney's fees. In that case, an award of attorney's fees in excess of that which the debtors contracted for essentially punishes the creditor for pursuing the debtor. An award of attorney's fees in excess of $62.50 per hour serves as a deterrent to creditors seeking effective access to the judicial system.

Because of his agreement with his clients, Respondents' attorney is not able to seek additional fees from his clients. His request, for fees in excess of what he contracted for, rises to a

request for a 50% "enhancement bonus" from the Petitioner as a result of prevailing at trial. The entry of such an award serves to discourage a creditor's access to effective judicial process. An award of attorney's fees in excess of that which Respondents contracted for punishes rather than reimburses.

The banking system and the FDIC are the back-bone of this Country. The Petitioner is a part of the process which provides that the FDIC shall liquidate failed institutions and sell their assets to replenish the deposit insurance. An award of attorney's fees in excess of what the Respondents' attorney contracted for not only unjustly enriches Respondents' attorney, but acts as a deterrent to those similarly situated to the Petitioner from seeking redress of a

guarantor's promise to pay the debt of another. The entry of award of attorney's fees in excess of that which the Respondents are required to pay to their attorney serves as a deterrent to Petitioner's access to the judicial system, thereby rendering the process ineffective.

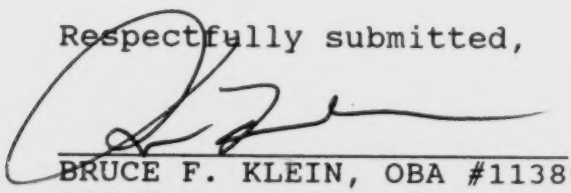
The incorrectness of this award of attorney's fees is further amplified by the express language of 12 O.S. § 936 which provides that the prevailing party, not his attorney, shall be awarded reasonable attorney's fees. The logical extension of this Statute is that 12 O.S. § 936 is designed to reimburse, not unjustly enrich. A prevailing party, according to 12 O.S. § 936, is reimbursed for its "out-of-pocket" attorney's fees. To do otherwise unjustly enriches the

prevailing party's attorney and serves to subsidize the legal profession.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



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Dated July 16, 1993

shc3: Pet\Chasteen.cer

APPENDIX

A. ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE CADLE COMPANY, II, INC.	)	
Plaintiff-Appellant,	)	
v.	)	No. 92-6318
	)	(D.C. No. CIV-90-1270-R)
CHARLES R. CHASTEEN; BILLY M. CARTER; BILLY M. HOLMES; and LENDELL D. ROBERTS,	)	W. D. Okla.
Defendants-Appellees.	)	

ORDER AND JUDGMENT*[1]

Before **LOGAN, MOORE** and **BRORBY**, Circuit Judges.

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[1]This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the brief and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This case is founded upon diversity jurisdiction and presents for appeal the issue of whether prevailing counsel should be awarded attorney fees based upon a reasonable hourly rate or the agreed upon rate. The district court applied the reasonable hourly rate and we affirm.

The significant matters are not disputed. Appellee prevailed in federal district court. As this was a diversity suit, the trial court applied the law of the forum (Oklahoma) and awarded Appellee reasonable attorney fees.

The problem arises in that during the litigation Appellee's counsel retroactively reduced his fees from $125 per hour to $62.50 per hour, due to his client's poor financial condition. Appellant does not challenge whether $125 per hour is a reasonable hourly rate for Appellee's attorney, but instead asserts that Appellee's attorney should have been awarded $62.50 per hour, the amount he actually charged the client. The facts leading up to the reduced billing and the district court's rationale were succinctly stated as follows:

> There is no questions that the hourly rate Mr. Tobin eventually agreed to with his clients was not a reasonable hourly rate for his services, nor was it the market rate. Because he had some sympathy with his clients' financial position and reduced his hourly rates does not in my opinion entitle the Plaintiff, as the nonprevailing party, to the benefit of that bargain.... The

> key factor is the prevailing market rate for the services of an attorney of comparable experience and qualifications. I see no reason why the same determination should not apply when an attorney, because of financial concern for his/her client, has charged the client a rate below a "reasonable" hourly rate.

The trial court concluded the key factor to be the prevailing market rate for the services of the attorney rather than the agreed reduced rate that resulted from the attorney's financial concern for his client.

Appellant asserts, as its only issue, that the trial court erred by awarding the reasonable rate rather than the agreed upon rate. Appellant accepts all factual findings of the trial court.

The parties agree we review the trial court's award of attorney fees to determine if the trial court abused its discretion. Iqbal v. Golf Course

Superintendents Ass'n of America, 900 F.2d 227, 228 (10th Cir. 1990). The establishment of hourly rates in awarding attorney fees is within the discretion of the trial judge. Gurule v. Wilson, 635 F.2d 782, 794 (10th Cir. 1980), overruled on other grounds sub nom. Cox v. Flood, 683 F.2d 330, 331 (10th Cir. 1982). "Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." McEwen v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 1991).

As we are applying the law of the forum, we first look to Oklahoma law. Okla. Stat. Ann. titl. 12, § 936 (West 1988) provides: "[T]he prevailing party

shall be allowed a reasonable attorney fee to be set by the court." Oklahoma cases hold that a court, in fixing the value of a reasonable attorney fee, should consider every fact or circumstance "bearing on fair compensation for the professional services rendered." Walls v. Russell, 519 P.2d 936, 938 (Okla. Ct. App. 1974), overruled on other grounds sub nom. Russel v. Flanagan, 544 P.2d 510, 512 (Okla. 1975). A reading of the Oklahoma cases, however,reveals no cases directly on point. When there is no law directly on point, our task is to attempt to predict how the Oklahoma courts would decide the issue.

If there is a common thread running through attorney fee cases, it is that of reasonable compensation in light of all the circumstances. The fee agreement existing between an attorney and client is

but one of the circumstances to be considered. If the fee agreement fails to provide for reasonable compensation, then the fee agreement along should not be determinative in an action against a nonparty to the agreement for a "reasonable attorney's fee." This principle was enunciated in Blanchard v. Bergeron, 489 U.S. 87 (1989), when considering whether a litigant could recover an attorney fee in excess of the fee agreement. There the Supreme Court stated:

> As we understand [42 U.S.C.] § 1988's provision for allowing a "reasonable attorney's fee," it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant

> should nevertheless be required to pay the higher amount.

Id. at 93.

In the case before us, Oklahoma law mandates "a reasonable attorney fee"; it does not mandate the agreed upon fee arrangement.

Appellant argues this result would unjustly enrich the prevailing party's counsel and result in a windfall. Appellant cites Florida Rock Indus., Inc. v. United States, 9 Cl. Ct. 285 (1985), as supporting its position that the attorney fee should be limited to the amount fixed by the attorney-client contract. In Florida Rock, the Claims Court held that "where there is a bona fide contractual arrangement whereby the client has committed to pay the amount billed by the attorneys, ... the court should not second-guess the workings of the market in

determining the reasonableness or appropriateness of the fees." Id. at 288. However, market value, as indicated by a fee arrangement, does not reflect what is a "reasonable attorney fee" if the attorney reduces the fee rate because of a client's poor financial condition. Instead, market value is but one of the factors to be considered in determining reasonableness.

Nor are we persuaded by Appellant's "windfall" argument. Attorneys who reduce their hourly rates for poor clients should not be penalized for so doing. Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988) (en banc).

Based upon the facts of this case, we cannot hold the trial court abused its discretion in awarding reasonable attorney fees in lieu of the agreed rate.

The judgment is **AFFIRMED.**

Entered for the Court:

WADE BRORBY

Circuit Judge

ENTERED MARCH 29, 1993

APPENDIX
B. ORDER OF THE COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CADLE COMPANY II, INC.,	)	
Plaintiff,	)	
v	)	CIV-90-1270-R
CHARLES R. CHASTEEN, ET AL.,	)	
Defendants.	)	

O R D E R

On the 18th day of August, 1992, this matter came on for hearing on the Defendants' Application and Supplemented Application to Tax Attorney Fees. The Plaintiff appeared by counsel Bruce F. Klein and the Defendants appeared by counsel Paul K. Tobin. The parties have consented to magistrate judge jurisdiction pursuant to 28 U.S.C. §636(c), for purposes of a ruling on the attorney fee application. Having considered the evidence presented, the briefs of the

parties, and the arguments of counsel, the following order is entered.

PROCEDURAL HISTORY

This diversity action was instituted by the Plaintiff seeking to collect from the Defendants as guarantors, the balance owed under a promissory note. The matter was tried to a jury and the jury found in favor of the Defendants and against the Plaintiff. A Judgment in accordance with the jury verdict was entered by the Court on March 25, 1991. Thereafter, on April 8, 1991, the Defendants filed their initial applications for attorney fees, seeking an attorney fee award of $16,150.00 based upon 129.2 hours expended by Defendants' attorney at $125.00 per hour. Plaintiff timely objected to the application, but by an order dated May 17, 1991, United States District Judge David L. Russell found that the Defendants were

entitled to a reasonable attorney fee. Judge Russell ordered the parties to confer in an attempt to agree upon the amount of attorney fees to be awarded, but the parties were unable to reach such an agreement. On March 19, 1992, Defendants filed their supplemented application for attorney fees, seeking a total attorney fee award of $20,787.50 based upon 166.3 hours at $125.00 per hour. In the supplemented application, Defendants advised the Court that the Tenth Circuit had recently affirmed the judgment on appeal, and had found that the Defendants were entitled to attorney fees for the appeal, with this Court to determine the amount of fees to award. On April 7, Plaintiff filed its objection to the supplemented application, contending that the hours claimed by the Defendants were excessive as was the hourly rate. On June

18, 1992, Defendants filed an addendum to the supplemented application showing that the Plaintiff's attorney expended over 100 hours more on this case than did the Defendants' attorney. On July 17, the parties consented to magistrate judge jurisdiction and the matter was then referred to the undersigned Magistrate Judge for disposition of the attorney fee application.

ISSUE

The sole issue before the court is to determine a reasonable fee as Defendants' entitlement to an attorney fee award has already been established by Judge Russell's order of May 17, 1991, and by the Tenth Circuit's order of February 27, 1992.

DISCUSSION

The most useful starting point in determining the amount of a reasonable

attorney fee is to take the number of hours reasonably expended in the litigation and multiply the hours by a reasonable hourly rate. Cooper v. Utah, 894 F.2d 1169, 1171 (10th Cir. 1990); Brown v. Phillips Petroleum Company, 838 F.2d 451, 453 (19th Cir. 1988), cert. denied, 488 U.S. 822 (1988), quoting from Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

Although Plaintiff objected in its brief to the number of hours Defendants' counsel expended in the case, Plaintiff's counsel admitted at the hearing that the Plaintiff does not seriously challenge this. Further, as noted earlier, Plaintiff's counsel expended over 100 hours more in the prosecution of this action than the Defendants' attorney did in defending it. Having reviewed the application and the detailed time records

provided by Defendants' counsel, the Court is of the opinion that all of the hours expended by counsel were reasonably spent in defense of this lawsuit, with the exception of the 10.9 hours discussed below.

Defendants' attorney seeks reimbursement for 10.9 hours spent in settlement discussions with the Plaintiff prior to the lawsuit being filed. The clear wording of the Oklahoma statute under which Defendants are entitled to an attorney fee award, (12 Okla. Stat. §936), appears to limit the fee award to the time spent after the lawsuit was filed. Absent any citation by Defendants of case or other controlling law to the contrary, the Court finds that the Defendants are not entitled to a fee award for the 10.9 hours spent in settlement discussions prior to the filing of the lawsuit. Accordingly,

the Court finds that the number of hours reasonably expended by the Defendants' attorney in this litigation was 155.4 hours, which is the number of hours claimed by Defendants' counsel less the 10.9 hours discussed above.

As noted, the second element in determining a reasonable attorney fee is to determine a reasonable hourly rate. Mr. Tobin seeks compensation at $125.00 per hour, which is his normal hourly rate. However, although Mr. Tobin initially billed his clients in this case at this normal hourly rate, he later agreed to reduce his rate to $62.50 per hour retroactively to the beginning of this litigation, due to his clients' financial condition. Plaintiff therefore contends that Mr. Tobin should be limited to the $62.50 as a reasonable hourly rate.

The Court is familiar with Mr. Tobin's qualifications and in an application filed by him in another lawsuit, I found that a reasonable hourly rate for his services was $125.00 per hour. In my opinion, a different result is not required here, just because Mr. Tobin reduced his hourly rates for the benefit of his clients. Further, the Court is generally familiar with the hourly rates charged by attorneys in the Oklahoma City area, and I find that the hourly rate sought by Mr. Tobin is in line with hourly rates charged by attorneys of similar experience.

It is clear from Tenth Circuit case law that in calculating a reasonable hourly rate, the district courts are to consider the prevailing market rates in the area for an attorney of like experience and qualifications. See, e.g.,

Lucero v. City of Trinidad, 815 F.2d 1384, 1385 (10th Cir. 1987). The customary hourly rate of a lawyer is relevant but not conclusive in determining the hourly rate. Id. Further, any fee agreement between the client and the attorney is relevant, but not conclusive. As U.S. District Judge Robin J. Cauthron noted in an article published in the Oklahoma Bar Journal:

> Many attorneys spend considerable time and effort proving, both in support of claims for fees and in defense thereto, the contract or agreement for payment between the claiming attorney and his client. Generally, this exercise is seldom worth the effort. The fee is not limited or set by counsel's contract with the client, rather it is the court's obligation to find and award a reasonable fee calculated in the usual way.

Robin J. Cauthron, "Proving Attorney's Fees in Federal Court," 61 Oklahoma Bar Journal 2813, 2815 (1990).

Neither counsel has shown that the Oklahoma courts would apply any different standard in establishing a "lodestar" fee.

There is no question that the hourly rate Mr. Tobin eventually agreed to with his clients was not a reasonable hourly rate for his services, nor was it the market rate. Because he had some sympathy with his clients' financial position and reduced his hourly rates does not in my opinion entitle the Plaintiff, as the nonprevailing party, to the benefit of that bargain. As Judge Cauthron noted in her article, in determining a reasonable hourly rate, the Court considers the attorney's agreement with his/her client and considers that attorney's normal hourly rate, but these factors are relatively unimportant in the final determination. The key factor is the prevailing market rate for the services of

an attorney of comparable experience and qualifications. I see no reason why the same determination should not apply when an attorney, because of financial concern for his/her client, has charged the client a rate below a "reasonable" hourly rate.

Plaintiff cites to the case of Florida Rock Industries, Inc. v. United States, 9 Cl. Ct. 285 (1985) in support of its position that Defendants' attorney is limited to the hourly rate agreed to between him and his clients. However, in that case, the Court agreed that a "market rate" for the attorney's services was the primary standard in determining a reasonable hourly rate, but the Court found that since the attorney and his clients had agreed to the particular fee, the market had spoken. Id. at 288, 290. Here, Plaintiff cannot seriously argue that the prevailing rate of an attorney of

Mr. Tobin's experience and qualifications is $62.50 per hour. The Court finds that the case of Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988), to be more persuasive. In Hodel, the court noted that attorneys who reduced their hourly rates for poorer clients should not be penalized when seeking attorney fees as a prevailing party, by being limited to the reduced hourly rate charged the client. Rather, the prevailing market rate is the proper standard to apply. Id. The Court further rejects Plaintiff's contention that compensating Defendants' attorney at a higher hourly rate than the contract he had with his clients results in a "windfall." Awarding Mr. Tobin an attorney fee award calculated on the number of hours he reasonably expended in the litigation times a reasonable hourly

rate, by definition, necessarily cannot produce a windfall.

As note, Defendants' entitlement to an attorney fee award arises under an Oklahoma statute, but the wording of that statute appears consistent with this analysis as it allows the Court to award "a reasonable attorney fee." 12 Okla. Stat. §936.

Under federal law, the lodestar fee once calculated will normally produce a reasonable attorney fee. See Cooper v. Utah, 894 F.2d at 1171. In fact, recent Supreme Court and Tenth Circuit opinions have recognized that most of the factors federal courts use to consider in determining whether a bonus or enhancement was appropriate, are subsumed into the lodestar calculation. See, e.g., Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 565

(1986); see also, City of Burlington v. Dague, 112 S.Ct. 2638 (1992); Homeward Bound, Inc. v. Hissom Memorial Center, 963 F.2d 1352 (10th Cir. 1992). However, as the Court's jurisdiction is based upon diversity of citizenship, we apply Oklahoma law with respect to an attorney fee award. R.L. Clark Drilling Contractors, Inc. v. Schramm, Inc., 835 F.2d 1306, 1309 (10th Cir. 1987). Under Oklahoma law, once a reasonable attorney fee is determined based on an hours times rate basis, the Court is to determine whether or not a bonus or enhancement is appropriate based on the following factors:

(a) time and labor required;
(b) novelty and difficulty of the questions;
(c) the skill requisite to perform the legal services properly;
(d) the preclusion of other employment by the attorney due to acceptance of the case;
(e) the customary fee;

(f) whether the fee is fixed or contingent;
(g) time limitations imposed by the client or the circumstances;
(h) the amount involved and the results obtained;
(i) the experience, reputation and ability of the attorney;
(j) the undesirability of the case;
(k) the nature and length of the professional relationship with the client; and
(l) awards in similar cases.

Oliver's Sports Center, Inc. v. National Standard Insurance Company, 615 P.2d 291, 295 (Okla. 1980); State ex rel. Burk v. City of Oklahoma City, 598 P.2d 659, 661 (Okla. 1979). The Defendants here do not seek an enhancement or bonus award and they have not presented any justification for such bonus under the above-cited factors. Thus, I find that the factors justifying a bonus or enhanced fee are not present in this case. I further find that an hourly rate for the hours reasonably expended appears to fully compensate counsel.

Accordingly, the Court finds that a reasonable attorney fee award in favor of the Defendants and against the Plaintiff is $19,425.00 calculated at 155.4 hours times $125.00 per hour. It is therefore ordered, adjudged and decreed that the Defendants have and recover judgment in the amount of $19,425.00 against the Plaintiff as a reasonable attorney fee. Appropriate interest pursuant to 28 U.S.C. §1961 shall accrue from the date of judgment.

IT IS SO ORDERED this 26th day of August 1992.

s/ Doyle W. Argo
DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

APPENDIX

C. ORDER DENYING PETITION FOR REHEARING

ENTERED APRIL 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CADLE COMPANY II, INC.,	)	
Plaintiff-Appellant,	)	
v.	)	No. 92-6318
	)	(D.C. #CIV-90-
CHARLES R. CHASTEEN, BILLY M.HOLMES, LENDELL D. ROBERTS,	)	1270-R)
Defendants-Appellees.	)	

ORDER
Entered April 19, 1993

Before LOGAN, MOORE and BRORBY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

s/Patrick Fisher

By Patrick Fisher
Chief Deputy Clerk

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

No. 93-119

In The

Supreme Court of the United States

October Term, 1993

THE CADLE COMPANY II, INC.,

Petitioner,

v.

CHARLES R. CHASTEEN, BILLY M. CARTER, JIMMY J. HOLMES AND LENDELL D. ROBERTS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the determination by a District Court in a diversity action of what constitutes a "reasonable" hourly rate for an attorney's fee allowance under a state fee-shifting statute, in addressing an undecided issue of state law, should be guided by how the District Court believes the state's courts would decide the matter rather than by how federal courts would rule on similarly worded federal statutes?

STATEMENT OF THE CASE

The facts of the case are stated in the decisions of the District Court (Petitioner's Appendix B, at 2-4 and 7-8) and the Court of Appeals (Petitioner's Appendix A, at 2-4).

SUMMARY OF THE ARGUMENTS

In this diversity case, the District Court and Court of Appeals applied what they found to be the law of Oklahoma in respect to a state fee-shifting statute, in an instance where there was no state decisional law directly on point. The lower federal courts properly approached the issue as if they were sitting as a state court.

Petitioner has not demonstrated a conflict with the decisions of this Court, suggested a conflict among the circuits or raised an issue under the Constitution or Federal law.

ARGUMENT

I.

THE LOWER FEDERAL COURTS CORRECTLY APPLIED THE ERIE DOCTRINE

The resolution of this Petition begins and ends with an Oklahoma statute providing for allowance of "a reasonable attorney fee" to the prevailing party in certain actions. In an action founded on diversity, Respondents prevailed in federal district court and on appeal. During the action, Respondents' attorney retroactively reduced

his hourly rate for services from $125.00 per hour to $62.50 due to hardship the litigation imposed on Respondents. The District Court determined Oklahoma courts would apply a market based rate and fixed $125.00 as a reasonable hourly rate in assessing attorneys fees.

Although Petitioner does not dispute that a reasonable hourly rate under most circumstances was that selected by the District Court, it argues the District Court and Court of Appeals should have applied Okla. Stat. Ann. tit. 12, § 936 (West 1988) by reliance on a decision of the United States Claims Court in *Florida Rock Industries, Inc. v. United States,* 9 Cl.Ct. 285 (1985), applying the reimbursement provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 43 U.S.C. § 4645(c) (1976). See, Petition, at 12. Likewise, Petitioner asserts the lower courts should have followed Judge Starr's dissenting opinion in *Save Our Cumberland Mountains, Inc. v. Hodel,* 273 U.S.App.D.C. 78, 857 F.2d 1516, 1528 (D.C. Cir. 1988) (en banc) addressing reasonable attorney fees under, among other federal statutes, § 530(d) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d).

Decisions from *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) to *Commissioner v. Estate of Bosch,* 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) direct otherwise. Naturally, while authority on similarly worded federal fee-shifting statutes may be persuasive in applying a state statute to a non-constitutional issue unaddressed by the state's highest court, a federal court is to choose the rule it believes the state is likely to adopt. In such circumstances, federal courts sit, in effect, as state

courts. *Estate of Bosch,* 387 U.S. at 465, 87 S.Ct. at 1782-1783.

Petitioner does not even contend Oklahoma courts might agree that a discounted 'hardship' hourly rate sets the upper limit of a "reasonable" rate under Okla. Stat. Ann. tit. 12, § 936 (West 1988). Indeed, Petitioner cites no Oklahoma case authority.

Petitioner's exclusive reliance on federal fee-shifting authorities is understandable in light of the approach to setting attorney fees historically taken by Oklahoma's highest Court.

To set a reasonable attorney fee, Oklahoma courts determine a multiplier of a reasonable number of hours times a reasonable rate. Although Oklahoma courts initially look to the hourly rate for comparable representation where compensation is guaranteed, they then adjust the hourly rate where compensation is contingent by assessing the likelihood of success at the outset of the representation. After determining this hourly rate base, the courts then look to the 12 "Johnson" factors as guidelines to decide if the hourly calculation should be adjusted upward. *State ex rel. Burk v. City of Oklahoma City,* 598 P.2d 659, 661 (Okla.1979); *Oliver's Sports Center, Inc. v. National Standard Ins.,* 615 P.2d 291, 294-295 (Okla. 1980).

Comparison of these Oklahoma decisions with this Court's ruling in *City of Burlington v. Dague,* ___ U.S.___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) is sufficient to demonstrate that federal case law on what is "reasonable", while persuasive, is not a sure road map to how Oklahoma courts will decide the issue.

Federal courts, in deciding issues of state law in diversity cases, keep in mind that their function is not to choose the rule they would adopt for themselves, but to adopt the rule they believe the state's highest court will adopt when faced with the issue. *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940).

Petitioner fails to demonstrate why the *Erie* Doctrine should be abandoned in favor of the federalization of state attorney fee statutes.

II.

PETITIONER HAS FAILED TO DEMONSTRATE WHY A WRIT SHOULD ISSUE

It need only be noted in passing the Petitioner claims no conflict among the circuits, raises no Constitutional issues and does not contend its rights under federal statute have been impeded.

Moreover, Petitioner has not demonstrated any conflict with the decisions of this Court. Petitioner ignores the Court of Appeals analogy to the holding of *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct 939, 103 L.Ed.2d 67 (1989) with the result in this case. See, Petitioner's Appendix A, at 7-8. In *Missouri v. Jenkins*, 491 U.S. 274, 283, 109 S.Ct. 2463, 2469, 105 L.Ed.2d 229, 240 (1989) the Court stressed attorney fee awards are to be based on market rates for services rendered under the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988). The ruling below follows this path.

Finally, contrary to Petitioner's claim, the District Court did not award any "bonus"; indeed none was requested. See, Petitioner's Appendix B, at 15. Rather, the District Court multiplied a reasonable number of hours times a reasonable rate to arrive at an award. By definition, there was no "windfall". *Blanchard, supra,* 489 U.S. at 96, 109 S.Ct. at 946.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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